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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1393

CHARLES CROCKARELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AT CINCINNATI

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 15, 1973.

CITATIONS TO OPINIONS BELOW

1. Order of the Court of Appeals unreported filed February 15, 1973 (Appendix A-76).

JURISDICTION

The Court of Appeals entered judgment on February 15, 1973, time for filing has been extended for filing this petition to April 16, 1973.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

Whether the calling by the prosecution in a criminal case of a witness the prosecution knows will invoke his 5th Amendment right to refuse to answer questions on cross-examination violates the defendant's Sixth Amendment right to be confronted with the witnesses against him and/or his right to cross-examination under the due process clause of the 5th Amendment.

II.

Whether the failure of a trial judge to hold a complete evidentiary hearing outside the presence of the jury is violative of the due process clause of the 5th Amendment and the requirement of 18 U.S.C. §3500 (Jencks Act), where it is shown that a tape recording allegedly impeaching a key government witness has been destroyed by government agents.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

1. Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases aris-

ing in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Statute 18 U.S.C. 3500:

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on

motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Petitioner respectfully contends the Writ should be granted as it presents issues important to the criminal processes not yet passed upon by the Court, but which will continue to be raised in other cases.

II. The petitioner has not received needed and proper relief by the Courts below

STATEMENT OF CASE AND FACTS

A five count indictment was filed against petitioner on September 15, 1971, charging in Count One that petitioner, from on or about August 24, 1970, to on or about November 17, 1970, conspired with Lim Manners, Melvin Lynn Manners and Larry Neal Manners, in violation of Title 18, §371, U.S.C., to defraud the United States by manufacturing, distilling, possessing, transporting, removing, depositing and concealing untaxed distilled spirits by using his official position as Sheriff of Stewart County, Tennessee, to execute the conspiracy by furnishing them a confiscated still and to conceal and protect the operations. In Count Two petitioner was charged as an aider and abetter. In Count Three petitioner was charged with unlawfully possessing a still, in violation of Title 26, §5686(a), U.S.C. In Count Four petitioner was charged with unlawfully possessing eight (8) butane gas condensers and two (2) burners, in violation of Title 26, §5686(a), U.S.C. In Count Five petitioner was charged with unlawfully possessing two (2) cooling tubs, in violation of Title 26, §5686(a), U.S.C.

The Trial Court, upon petitioner's motion, entered a judgment for acquittal on Count Two. Petitioner was found guilty by the Jury on Counts One, Three, Four and Five and was sentenced to two (2) years and fined the sum of $3,000 under Count One, with four months to be served in jail and the remaining twenty months suspended and placed on probation and that imposition of sentence under Counts Three, Four and Five would be suspended.

On August 4, 1970, Special Investigator Hubert T. Giles, of the Alcohol, Tobacco and Firearms Division and the petitioner went looking for an illegal still which was not found that day. Giles testified that on September 1, 1970, the petitioner told him that he had found a still and had destroyed it, and that on November 17, 1970, Giles

himself found an illegal still in the Leatherwood section of Stewart County and, in conjunction with the discovery, he arrested Larry Manners and Melvin Manners.

Wilford J. Souza, a professional photographer, testified that on August 13, 1970, he took some pictures of a still which was located in petitioner's yard. He also testified that he took some pictures of the still which Special Investigator Giles found on November 17, 1970. Deputy Sheriff Alvin Crutcher testified that he assisted the petitioner in the seizure of the still on August 12, 1970, and carried it to the petitioner's residence. He also testified that on September 24, 1970, the still was still in the petitioner's smokehouse.

Lim Manners, twice convicted in Federal Court on whiskey charges, testified that in the last days of August, 1970, he met petitioner and paid petitioner $1,400 for the still. Then sometime in the latter part of September, Manners testified that he and his son, Melvin Manners, went to the petitioner's house and took the still from petitioner's smokehouse and that he never saw the still again.

Melvin Manners testified that he was arrested with his brother, Larry Manners, while operating an illegal still on November 17, 1970, and that it was the same still that he had gotten from petitioner. Thereafter, petitioner's counsel, on cross-examination, asked the witness about the operation of the still and the source of his supplies. The Trial Court at first allowed petitioner's counsel to ask the witness who his supplier was. Then in a hearing out of the presence of the Jury, he refused to instruct the witness to answer the questions (App. A-11-19). Petitioner's counsel requested the court reporter to transcribe Melvin Manners' testimony from the previous trial (which ended in a mistrial) and after this was done, the Trial Court permitted petitioner's counsel to question the witness on the source

of his supplies (App. A-19-26). Then, in the presence of the Jury, when the question was asked, the witness claimed his privilege against self-incrimination (App. A-26). A recess was taken, the Jury was excused, then brought back in, and again in front of the Jury, the Trial Court instructed the witness to answer and he again refused (App. A-27-28). Again the Jury was excused (App. A-28-29). An attorney was then appointed to represent the witness and he stated that this same situation occurred in the previous trial (App. A-29-32). The Trial Court then changed its decision and allowed the witness to claim the privilege (App. A-34). Petitioner's counsel then made a motion that the witness' entire testimony be stricken, which was denied (App. A-35). The Trial Court then had the Jury brought back and explained why he was allowing the witness to claim the privilege (App. A-35-36).

Petitioner's defense was that he had indeed confiscated the still in question, but that it had been stolen from his smokehouse and that he had never received any money from Lim Manners.

Lim Manners was then recalled by the Government in rebuttal and, on cross-examination, he testified that it was not his still that petitioner had seized on August 12, 1970. Petitioner's counsel had been given a copy of a four page statement in which it was stated, in effect, that it was Lim Manners' still. The Trial Court then began to conduct an inquiry into the preparation of the statement (App. A-36-39). When it was learned that the statement was made from a tape recording made by one Clayton Spiers, an attorney was appointed for him (App. A-40-43).

After consulting with the attorney, the Trial Court, out of the presence of the Jury, called Spiers as its witness (App. A-43-44). He testified as to what he remembered was on the tape. The Trial Court then stated that he

would call and put Spiers on the stand before the Jury and that he would order the Government to put on the agents who took the tape and testify as to how the four page statement was prepared. This was to be in front of the Jury (App. A-52-53). Petitioner's counsel objected to this procedure, but was overruled. Then the Trial Court stated that he would not interrogate the witness Spiers in front of the Jury, but this would be done by either the Government or petitioner's counsel in open Court (App. A-53-57). The Government objected to this course of action.

The Trial Court then suggested that petitioner's counsel call Agents Rollins and Giles, since they had prepared the four page statement (App. A-58). Petitioner's counsel was reluctant to call the Government's agents as his witnesses (App. A-58). The Trial Court then stated "We are not going to play around with this case and get a mistrial" (App. A-58).

The Trial Court refused to adjourn the trial for a full investigation of the matter and ordered petitioner's counsel to talk to the Government agents to see if he wanted to put them on the stand. Petitioner's counsel refused to put them on the stand and to enter into a prepared stipulation with the Government. Once again the Trial Court stated that it was up to petitioner's counsel to put on the Government agents (App. A-59-74). Petitioner's counsel then called the agent who destroyed the tape and the secretary who burned her notes on the tape.

Appeal was perfected to the U. S. Court of Appeals for the Sixth Circuit. A short order affirming was returned, the Court did not discuss any of the issues raised holding simply that no prejudicial error had occurred (App. A-76).

Petitioner is now properly before this Court by this Petition.

ARGUMENT

I.

Whether the Calling by the Prosecution in a Criminal Case of a Witness the Prosecution Knows Will Invoke His Fifth Amendment Right to Refuse to Answer Questions on Cross-Examination Violates the Defendant's Sixth Amendment Right to Be Confronted with the Witnesses Against Him and/or His Right to Cross-Examination under the Due Process Clause of the Fifth Amendment.

The petitioner submits that the use of testimony given by a witness who exercised his privilege against self-incrimination on cross-examination constituted a violation of his right of confrontation contained in the Constitution, *U.S. Const.*, Amend. 6.

While admittedly the petitioner and the witness were confronted in a physical sense, the U. S. Supreme Court has indicated that the right of confrontation consists of more than mere physical proximity. In *Barber* v. *Page*, 390 U.S. 719, 725 (1969) it was stated that "the right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." It was the former aspect of the right of confrontation that was absent in the instant case.

Of the two purposes of the confrontation right, the Courts have emphasized the opportunity to cross-examine the witness. Exceptions to the confrontation requirement have been permitted in situations where the defendant has had the opportunity to cross-examine the unavailable witness at some earlier judicial proceeding, *Mattox* v. *U. S.*, 156 U.S. 237 (1895). In admitting the missing witness's testimony under these circumstances courts have pointed

to the fact that the previous cross-examination is freely admissible, *Owens* v. *Eyman*, 434 F.2d 1062 (9th Cir., 1970), *Jones* v. *Calif.*, 364 F.2d 522 (7th Cir., 1966). No such opportunity was available to the petitioner.

The petitioner submits that Melvin Manners' refusal to answer certain questions on cross-examination (App. A-23-29), on grounds of the privilege against self-incrimination in essence denied him of his right to confront the witness. In the face of this constitutional violation, the Trial Court should have stricken the witness' testimony.

At the petitioner's first trial, the prosecution called Melvin Manners as a witness. While answering all questions put to him during direct examination, he refused to answer certain ones asked during cross-examination. The prosecution was aware of this when he called the witness to testify in the instant trial (App. A-19-26). The petitioner submits the prosecutor realized that the witness would claim the privilege against self-incrimination upon being cross-examined upon certain questions. The petitioner thereupon submits it was reversible error for the testimony given by the witness on direct examination to be admitted in evidence.

In a recent U. S. Court of Appeals case, *U. S.* v. *King*, 461 F.2d 53 (8th Cir. 1972), it was held that the government unduly prejudiced the defendant by calling two witnesses when it was aware that both planned to assert the privilege against self-incrimination. The witnesses both invoked the privilege during direct examination. In the instant case the privilege was invoked by the witness during cross-examination. The distinction is not material. The defendant in both cases was thrown into a bad light as a result of the witness's refusal to give testimony. In *King*, the jurors, as a result of the failure of the witness to testify, were permitted to speculate, as to the defendant's

guilt. In the instant case, the witness was insulated from an attack upon his credibility.

An important limitation placed upon the idea that the calling of a witness who it is known will invoke his privilege against self-incrimination was demonstrated in *Namet* v. *U. S.*, 373 U.S. 179. In *Namet*, despite the use of witnesses who refused to testify, the U. S. Supreme Court affirmed the conviction. The reason was the lack of bad faith on the part of the prosecutor. At page 187 in the opinion the Court stated that "the prosecutor did not believe that the witnesses could properly invoke their privilege against self-incrimination."

II.

Whether the Failure of a Trial Judge to Hold a Complete Evidentiary Hearing Outside the Presence of the Jury Is Violative of the Due Process Clause of the Fifth Amendment and the Requirements of 18 U.S.C. §3500 (Jencks Act) Where It Is Shown That a Tape Recording Allegedly Impeaching a Key Government Witness Has Been Destroyed by Government Agents.

During the testimony of the key prosecution witness, Lim Manners, it was discovered that the source of a four page statement earlier attributed to the witness was actually a tape recording of a conversation by the witness (App. A-40-43). The tape had been destroyed by a federal agent (App. A-40). As a "recording [of] a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneous with the making of such oral statement" the tape would probably have been discoverable to the defendant under the *The Jencks Act*, 18 *U.S.C.* §3500. When the United States was unable to provide the petitioner with the tape because of the actions

of the federal agent in destroying it, the Trial Court had a statutory obligation to determine whether that action constituted an election "not to comply" under 18 *U.S.C.* §3500(d). The petitioner submits that to satisfy this obligation a full hearing concerning the tape was necessary.

The U. S. Supreme Court has recognized the existence of this obligation in *Campbell* v. *U. S.*, 365 U.S. 85 (1961) when it stated at page 95:

> "The statute [the Jencks Act] . . . implies the duty in the trial judge affirmatively to administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute . . . the Government . . . and . . . the accused . . ."

This judicial obligation was cited as an important aspect of the Jencks Act in *Ogden* v. *U. S.*, 303 F.2d 724. The Court in *Ogden* at page 733 stated that:

> "an affirmative duty is placed upon the Trial Court to secure the information which is necessary to a proper ruling on particular requests for production in the light of the statutory purposes."

U. S. v. *Bryant*, 439 F.2d 642 (D.C. Cir., 1971), demonstrated that the loss or destruction of a possible Jencks Act statement, such as the tape, was the type of question that the Trial Court should inquire into with greater thoroughness. The petitioners in *Bryant* were convicted primarily on the basis of an undercover agent's testimony as to conversations involving the petitioners. Although the conversation had been taped, the tape was subsequently lost while in the federal agent's possession. In remanding the case, the Court of Appeals ordered the trial court "to determine the degree of negligence or bad

faith involved on the part of the government." While several other factors were cited as being appropriate for the Trial Court's consideration, the conclusion is inescapable that when a possible Jencks Act statement is allegedly unavailable, the Trial Court is under a duty to make a detailed and thorough investigation into the circumstances surrounding its disappearance, outside the presence of the jury—this was not allowed by the trial court (A-53).

The contention might be made that destruction of a possible Jencks Act statement by federal agents before trial without the prosecutor's knowledge cannot be considered to be an election on the part of the Government. The petitioner submits that there are two fundamental reasons for rejecting this contention. The first reason is because the cases in this area simply do not support it. Courts have consistently refused to distinguish between cases where prosecutors were charged with control of the Jencks Act statement and those in which federal agents exercised complete dominion.

The petitioner submits as a second reason for rejecting the above contention the fact that to accept it would mean a frustration of a central policy behind the Jencks Act, i.e. providing the accused with a possible basis to impeach the Government's witness. Even in the absence of bad faith on the part of federal agents, the danger that such agents would adopt a policy of destroying the verbatim pre-trial statements of government witnesses is one too real to ignore.

Subsection (d) provides the Trial Court with two alternatives if the Government elects not to comply with the Jencks Act. The Court may "strike from the record the testimony of the witness" or if it deems the damage to be of such a magnitude that striking the testimony will not rectify that damage, the Court may declare a mistrial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted

Respectfully submitted,

DALE QUILLEN

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Charles Crockarell